

**6 PAGES**

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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION

In re:

SK FOODS, L.P., a California limited  
partnership,

Debtor.

Case No. 09-29162-D-11

Chapter 11

**DC No. SH-106**

In re :

RHM INDUSTRIAL/SPECIALTY FOODS,  
INC., a California Corporation, d/b/a Colusa  
County Canning Co.,

Debtor.

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO APPROVE  
COMPROMISE OF CONTROVERSY  
BETWEEN TRUSTEE AND  
CADMASTER TECHNOLOGIES LLC  
PURSUANT TO FEDERAL RULE OF  
BANKRUPTCY PROCEDURE 9019**

Date: June 15, 2011

Time: 10:00 a.m.

Place: Courtroom 34  
501 I Street, 6<sup>th</sup> Floor  
Sacramento, CA 95814

Judge: Hon. Robert S. Bardwil

1 Bradley D. Sharp (the “Trustee”), the duly appointed and acting Chapter 11 trustee for SK  
2 Foods, L.P., a California limited partnership (“SK Foods”), and RHM Industrial/Specialty Foods,  
3 Inc., a California corporation, d/b/a Colusa County Canning Co. (“RHM” and collectively with  
4 SK Foods, the “Debtors”), moves this Court for an order approving compromise, pursuant to  
5 Federal Rule of Bankruptcy Procedure 9019, between the Trustee and Cadmaster Technologies  
6 LLC (“Cadmaster”). The terms of the compromise are fully set forth in the agreement attached as  
7 Exhibit A to the declaration of Bradley D. Sharp filed herewith (the “Settlement Agreement”).

## 8 I. BACKGROUND

9 On May 5, 2009 (“Petition Date”), involuntary bankruptcy petitions were filed against  
10 Debtors SK Foods and RHM. SK Foods and RHM commenced the above-referenced bankruptcy  
11 case by filing a voluntary petition for relief under Chapter 11 of Title 11 of the United States  
12 Code on May 7, 2009. On May 18, 2009, the Court entered an order appointing Bradley D. Sharp  
13 as the Chapter 11 Trustee for the Debtors, and since that time, he has assumed control over the  
14 Debtors’ property and affairs pursuant to Section 1104 of the Bankruptcy Code.

15 Prior to the Petition Date, Cadmaster provided services to the Debtors. The Trustee  
16 alleges that within ninety (90) days prior to the Petition Date (the “Preference Period”), Debtors  
17 made a series of payments by check or wire transfer (“Transfers”) to Cadmaster totaling  
18 \$24,030.00 (the “Preference Payments”).

19 On April 6, 2011, the Trustee mailed a demand letter to Cadmaster asserting that the  
20 Trustee could avoid and recover the Transfers as preferential payments, pursuant to Section  
21 547(b) of the Bankruptcy Code (the “Trustee’s Demand”). Cadmaster asserts defenses under 11  
22 U.S.C. § 547.

23 The parties have met and conferred and now desire to end their dispute and in good faith  
24 reach a resolution as to all current and future demands or claims between the Trustee and  
25 Cadmaster related to the Preference Payments.

## 26 II. SUMMARY OF COMPROMISE

27 The Trustee and Cadmaster agree to a mutual release of claims related to the Preference  
28 Payments. Under the Settlement Agreement, Cadmaster agrees to pay the Trustee \$15,000.00 and

1 to waive any claim to which it might have been entitled under 11 U.S.C. §502(h) resulting from  
2 satisfying the Trustee's preference demand. The parties are to pay their own fees and costs.

### 3 III. APPLICABLE LEGAL STANDARD

4 By this motion, the Trustee seeks entry of an order approving the Settlement Agreement  
5 with Cadmaster. A compromise should be approved only if the Court finds "that the compromise  
6 is fair and equitable." *In re A&C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986). In  
7 determining the fairness and adequacy of a proposed settlement agreement, the Court should  
8 consider:

9 " (a) the probability of success in the litigation; (b) the difficulties, if  
10 any, to be encountered in the matter of collection; (c) the  
11 complexity of the litigation involved, and the expense,  
inconvenience and delay necessarily attending it; (d) the paramount  
interest of creditors . . ." *Id.*

12 ***Probability of Success:*** The Trustee believes he could successfully recover a portion of  
13 the preference payments through litigation against Cadmaster. However, Cadmaster asserts an  
14 ordinary course of business defense to the preference action, and litigation always involves the  
15 risk of an adverse ruling. A *prima facie* claim under 11 U.S.C. §547 is established where there is  
16 a transfer that: (1) benefits a creditor; (2) is on account of antecedent debt; (3) is made while the  
17 debtor was insolvent; (4) is within 90 days of bankruptcy; and (5) enables the creditor to receive a  
18 larger share of the estate than if the transfer had not been made. *Union Bank v. Wolas*, 502 U.S.  
19 151 (1991).

20 Cadmaster asserts that the Transfers are not avoidable as preferences under section  
21 547(c)(2) because the payments were made in the ordinary course of business. The so-called  
22 'ordinary course of business' defense involves a two-part subjective and objective inquiry. To  
23 qualify for "ordinary course of business" protection, a creditor must show: (1) the debt and its  
24 payment were "ordinary" in relation to past practices between the debtor and the creditor  
25 (§ 547(c)(2)(A) & (B), the "subjective test"); or (2) the payment was "ordinary" in relation to  
26 prevailing business standards (§ 547(c)(2)(C), the "objective test"). The subjective test looks at  
27 the time between invoice and payment and compares the average days during the preference  
28 period with the historic average between the debtor and creditor. *In re Healthcentral.com*, 504

1 F.3d 775, 790 (9th Cir. 2007). The case, *In re Grand Chevrolet, Inc.*, 25 F.3d 728, 732 (9th Cir.  
2 1994) prescribed four nonexclusive factors to consider in the subjective test:

- 3 1) the length of time the parties were engaged in the transactions at issue;
- 4 2) whether the amount or form of tender differed from past practices;
- 5 and 3) whether the debtor or creditor engaged in any unusual collection or payment activity;
- 6 4) whether the creditor took advantage of the debtor's deteriorating financial condition.

7 These factors do not constitute a “bright line” test and the inquiry is particularly fact  
8 sensitive. See *In re Ahaza Systems, Inc.*, 482 F.3d 1118 (9th Cir. 2007).

9 Under the objective test, preference period payments are not avoidable to the extent that  
10 they comport with practices common to businesses similarly situated to the debtor and creditor.  
11 *In re Jan Weilert RV, Inc.*, 315 F.3d 1192, 1197 (9th Cir. 2003). The parties’ behavior is judged  
12 against the industry’s ‘broad range’ of practices. “Only a transaction that is so unusual or  
13 uncommon as to render it an aberration in the relevant industry falls outside the broad range of  
14 terms encompassed by the meaning of ordinary business terms.” *Jan Weilert RV, Inc.*, 315 F.3d  
15 at 1198. BAPCPA included a “substantial broadening of the ordinary course of business defense”  
16 by requiring that a transfer meet either the subjective or the objective test, while pre-BAPCPA  
17 law required that a transfer meet both tests to assert a successful defense. See *In re SGSM*  
18 *Acquisition Co., LLC*, 439 F. 3d 233, 237 n.1, n.4 (5th Cir. 2006).

19 The Trustee looked at the average number of days that the Debtors historically waited to  
20 pay Cadmaster and compared this figure with the average during the preference period. The  
21 average number of days between the invoice date and the payment date increased from 29 days to  
22 78 days during the preference period. The payment history included a few payments that were  
23 made as far out as 114 and 116 days. The Trustee weighed the possibility that these late  
24 payments might constitute an ‘ordinary course of business’ between the Debtors and Cadmaster,  
25 and determined that there was a chance Cadmaster could prevail on its ordinary course of  
26 business defense.

27 Avoiding litigation costs was a significant factor considered by the Trustee in entering  
28 into the Settlement Agreement with Cadmaster. The Trustee anticipates he would incur between

1 \$5,000 and \$10,000 in litigation costs to initiate litigation against Cadmaster and proceed to  
2 judgment. Accordingly, the Trustee determined that settling without the need to initiate litigation  
3 was a favorable result for the estate.

4 ***Likelihood of Collection:*** The Trustee believes the Transfers, or Preference Payments,  
5 would be collectable. The proposed settlement, however, avoids any delay in collection.

6 ***Litigation Complexity and Expense:*** The legal theories on which any potential litigation  
7 would be based are not overly complex. The costs, however, associated with obtaining a  
8 judgment on this form of dispute are disproportionate to the amounts in controversy. Avoiding  
9 litigation costs by settling the dispute prior to filing an adversary proceeding was a key factor in  
10 the Trustee's decision to enter into the Settlement Agreement.

11 ***Interests of Creditors:*** The Trustee believes the interests of creditors are better served by  
12 resolving the dispute under the proposed terms, than initiating litigation against Cadmaster and  
13 risking an adverse ruling. Furthermore, resolving this dispute for a near-immediate payment of  
14 \$15,000 represents a reasonable compromise that avoids further fees and costs, including  
15 attorneys' fees. *See Declaration of Bradley D. Sharp*, attached hereto and filed herewith.

#### 16 IV. CONCLUSION

17 The Trustee believes that the compromise is in the best interests of creditors and the estate  
18 and should be approved.

19 WHEREFORE, the Trustee prays that the Court make and enter its Order:

- 20 1. Determining that, under the circumstances, parties in interest have received  
21 adequate notice and an opportunity to be heard;
- 22 2. Approving the compromise with Cadmaster in the form as attached to the  
23 Declaration of Bradley D. Sharp, filed herewith; and

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3. Granting such other or further relief as the Court deems just and proper.

Dated: June 1, 2011

SCHNADER HARRISON SEGAL & LEWIS LLP

By: /s/ Natalie Bush-Lents

Natalie Bush-Lents  
Attorneys for Bradley D. Sharp,  
Chapter 11 Trustee